[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	7
Conclusion	24

CITATIONS

Cases:	
Burnett v. *Piercy*, 149 Cal. 178	8, 23
Carlsen v. *Carter*, 377 Ill. 484	9
Carver v. *San Pedro, L. A. and S. L. R. Co.*, 151 Fed. 334	2
Central Land Co. v. *City of Grand Rapids*, 302 Mich. 105	13
City of Long Beach v. *Marshall*, 11 Cal. (2d) 609	10, 15, 16
Clifford v. *United States*, 34 C. Cls. 223	8
Cooke v. *Kinkead*, 179 Okla. 147	9
Cooper v. *Selig*, 48 Cal. App. 228	23
Davis v. *Skipper*, 125 Tex. 364	9
Estate of Fair, 132 Cal. 523	22
Keaton v. *Oklahoma City*, 187 Okla. 593	9
Las Posas Water Co. v. *Ventura County*, 97 Cal. App. 296	23
Los Angeles University v. *Swarth*, 107 Fed. 798	22, 23
Marshall v. *Standard Oil Co.*, 17 Cal. App. (2d) 19	12
Priddy v. *School Dist. No. 78*, 92 Okla. 254	9
Reclamation Dist. No. 1500 v. *Raub*, 58 Cal. App. (2d) 491	12
Regular Predestinarian Baptist Church, The v. *Parker*, 373 Ill. 607	9
United Iron Wks. v. *Outer H. etc. Co.*, 168 Cal. 81	17
West Pittston Borough v. *Clear Spring Coal Co.*, 22 Pa. Dist. 190	9
Williams v. *McKenzie*, 203 Ky. 376	9
Statutes:	
Cal. Civil Code (1937):	
secs. 715–718	22
sec. 755	8
sec. 1092	19
sec. 1442	22
sec. 1635	11
sec. 1637	17
sec. 1638	21
sec. 1641	21
sec. 1647	17
sec. 1648	14
sec. 1654	22
Cal. Stats. (1937), p. 2939	11
Cal. Code of Civil Procedure (1937), sec. 1860	17

Miscellaneous: Page

5 A. L. R. 1498, Ann. (1920) 9
39 A. L. R. 1340, Ann. (1925) 9
39 Op. A. G. 39 (1937) 9
4 Thompson, Real Property (Perm. Ed. 1940), sec. 2104, p. 649 9

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

LOS ANGELES AND SALT LAKE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 31, 1944, reversing a judgment of the United States District Court for the Southern District of California.

OPINIONS BELOW

The oral opinion of the district court (R. 467–516) is not reported. The opinion of the circuit court of appeals (R. 565–569) is reported in 140 F. (2d) 436.

JURISDICTION

The judgment of the circuit court of appeals was entered January 31, 1944 (R. 569). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under two deeds executed in 1908 and 1918 conveying strips of land to the United States, the removal of oil therefrom by the United States without interfering with use of the land as a navigable waterway would cause a reverter to the grantor.

STATEMENT

Cerritos Channel, which is 600 feet wide and more than a mile long, connects the harbors of Long Beach and Los Angeles, California. The channel runs through the Wilmington Oil Field and it has been estimated that 14,000,000 barrels of oil would be produced from lands under the channel. The present suit was instituted in order to settle a controversy whether the United States or the respondent is entitled to remove that oil. The material facts may be summarized as follows:

Prior to 1908 the harbors of Long Beach and Los Angeles, California, were separated by a tidal marsh, through which ran a navigable waterway known as Cerritos Slough. See *Carver* v. *San Pedro, L. A. and S. L. R. Co.*, 151 Fed. 334 (S. D. Calif. 1906). In that year respondent, Los Ange-

les and Salt Lake Railroad Company,[1] and Los Angeles Dock & Terminal Company made a joint application to the Secretary of War. This application stated that the companies desired to straighten and deepen the channel of Cerritos Slough which was a hindrance to navigation because of its sharp turns and shallows. The companies asked permission to dredge channels particularly described, offered to dedicate described lands for the channel and sought a permit to fill the parts of the old channel which would be abandoned. (R. 153–158.)[2] At the same time the railroad sought permission to build a drawbridge across the proposed channel in place of a bridge authorized in 1906 (R. 171). In June, 1908, the Secretary of War granted the permit subject to the condition, among others, "that a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States, free of cost, before the work of excavation is begun" (R. 164). The first of the two deeds here involved was thereafter executed pursuant to this condition.

The deed first recites the application for the permit and the granting thereof subject to the condition that the parties deed to the United States "a strip of land 400 feet wide" (R. 183).

[1] At that time respondent was named San Pedro, Los Angeles and Salt Lake Railroad Company (R. 3, 24).

[2] The application and the permit also related to Dominguez Creek which is not involved in the present case.

It states that respondent's board of directors had agreed to such condition and had authorized execution of the deed in performance of it (R. 184). The deed then provides (R. 184–186):

> * * * in consideration of the premises and of the granting of said permit and in pursuance of said resolution, the [Railroad Company] does hereby grant to the United States of America for the construction, maintenance and use of a free public navigable channel or waterway only, that certain parcel of land * * * described as follows: * * * it being the intention to convey a strip of land of the uniform width of four hundred (400) feet * * *.
>
> To Have and to Hold to the United States of America, as and for the purposes of a free, public, navigable channel, and subject for such purposes to the control, improvement and regulation of said grantee.
>
> Nothing herein contained, however, shall be deemed to prevent the use and occupation by the grantor, subject to approval by the United States, of the unused portions of the strip hereby conveyed until the same shall be required for the purposes of enlarging the channel; provided such use and occupation shall in no manner affect the rights herein granted; provided, further, that when the strip is required for channel purposes it shall be vacated within sixty (60) days after notice to vacate is given in writing by the grantee; and provided fur-

> ther that if the use of the said strip of land for the said granted purposes shall at any time be discontinued, or the same be abandoned or be used for any purposes other than specified herein, the estate and title hereby conveyed shall, without the necessity of a re-conveyance, revert to and vest in the grantor, its successors and assigns.

Attached to the deed were the resolutions of respondent's board of directors authorizing its execution (R. 191–196). Subsequently the trustee of a mortgage upon the railroad gave to the United States a "quit-claim deed * * * to a certain strip of land * * * conveyed by the [railroad]" (R. 198–200). The resolution of the trustee's Executive Committee authorizing this deed stated that the land involved was valued at $38,160 and the lands in the bed of the old channel which the railroad would be permitted to fill were worth $38,160 (R. 201–202).

The channel was thereafter dredged to a depth of 5 feet (R. 348–349). In 1918, in connection with projected improvements to the Los Angeles and Long Beach Harbors, it was determined to enlarge Cerritos Channel and an appropriation was made by Congress for such improvements upon condition that "local interests deed to the United States, free of cost, an additional strip of land 200 feet wide" (R. 224, 227). For this purpose, the second deed was executed so as to widen the strip to 600 feet. This deed omitted the recitals

of the earlier conveyance. The granting clause was also changed, simply providing that the railroad "does hereby grant to United States of America, Grantee, all that real property * * * described as follows" (R. 241). The habendum and the proviso clauses were substantially identical with those of the 1908 deed (R. 243). A quitclaim deed as to this land also was given to the United States by the railroad's mortgage trustee (R. 245–250).

The dredging in 1908 and 1918 was done by local interests. However, since that time the United States has incurred great expense in maintaining the channel as a navigable waterway, and is still so maintaining it. (R. 110, 348–350.) Applications have been made to the United States for oil and gas leases, and the railroad has formally protested the granting of such applications on the ground that the removal of minerals would cause a reverter of the lands deeded (R. 111–112). Because of this dispute the present action for a declaratory judgment was instituted by complaint filed January 9, 1942 (R. 2–24). The railroad answered on February 18, 1942 (R. 24–81), and thereafter evidence was taken and argument had. On November 16, 1942, the court orally announced its opinion (R. 467–516) and in March 1943 findings of fact and conclusions of law were entered (R. 108–120). The court held that the United States owned the lands in fee simple subject to the reservation that

they be used for a free, public, navigable channel (R. 119). It concluded that the production of oil therefrom without discontinuing or abandoning the navigable channel would not create a right of reversion (R. 119). The court refused to decide, or consider evidence on, whether it is practical to produce oil without interfering with navigation, for the reason that the authorization of the Secretary of War is a condition precedent to any drilling and no such authorization has been granted (R. 119–120). Judgment in conformity to these conclusions was entered (R. 120–125).

The circuit court of appeals reversed. After referring to the rules of construction which it deemed applicable it stated that the intention of the parties could, and therefore must, be ascertained from the deeds alone. That intention, it held, was that the United States should not use the land nor have a right to use it for any other purpose than a free, public, navigable channel. It declined to determine whether the deeds granted a fee simple title or merely an easement and limited its decision to holding that the United States had no right to use the channel for the production of oil or other mineral substances. (R. 565–569.)

REASONS FOR GRANTING THE WRIT

The court below, citing the rule that deeds are to be interpreted in accordance with the law of the state where the land they describe is situated, held

that interpretation of the deeds here in question was governed by California law. We do not contend that the rule is otherwise merely because the United States was the grantee under the deeds.[3] But we do contend that the court below erred in its purported application of California law to the deeds, and that its decision is probably in conflict with applicable decisions of the California courts. The question of local law thus presented is, we believe, important not only with reference to the substantial amounts involved in this case, but with reference to the frequently recurring problem of the incidence of the right to extract oil and other mineral deposits discovered on land previously granted subject to the condition of its continued use for a specified purpose.

1. The court below held that "the intention of the parties to the deeds here involved can, and

[3] *Cf. Clifford* v. *United States*, 34 C. Cls. 223, 232. The court below referred to several sections of the California Civil Code (1937) relating to interpretation of instruments. That code also provides (Sec. 755): "Real property within this state is governed by the laws of this state, except where the title is in the United States." While the meaning of this provision is not clear, we believe that, as applied to the instant case, it would exempt the United States from any unusual rules of interpretation contrary to those generally applied under the common law. However, the California Supreme Court has held that the rules of the Civil Code are not innovations but are simply statutory adoption of common law rules. *Burnett* v. *Piercy*, 149 Cal. 178, 188–189 (1906). Consequently, the rules expressed in the California Civil Code are applicable.

therefore must, be ascertained from the deeds alone" (R. 568). As indicated below (pp. 16–17), we believe that this holding in itself was not in accord with California law. But even if the intention of the parties is to be gathered from within the four corners of the deeds, without reference to the circumstances surrounding their execution, we believe that the decision is inconsistent with applicable decisions of the California courts.

The general rule is clear, that "where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground of forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed." 4 Thompson, *Real Property* (Perm. ed. 1940), Sec. 2104, p. 649; *The Regular Predestinarian Baptist Church* v. *Parker,* 373 Ill. 607 (1940); *Williams* v. *McKenzie,* 203 Ky. 376 (1924); *Carlsen* v. *Carter,* 377 Ill. 484 (1941); *Davis* v. *Skipper,* 125 Tex. 364 (1935); *Priddy* v. *School Dist. No. 78,* 92 Okla. 254 (1923); *Cooke* v. *Kinkead,* 179 Okla. 147 (1937); *Keaton* v. *Oklahoma City,* 187 Okla. 593 (1940); *West Pittston Borough* v. *Clear Spring Coal Co.,* 22 Pa. Dist. 190 (1907); 39 Op. A. G. 39 (1937). See Ann. (1920) 5 A. L. R. 1498; Ann. (1925) 39 A. L. R. 1340.

The court below did not question that this rule, established by the general body of decisions from various states, is also the rule in the State of California. Rather, it rested on the fact that here

the deeds specifically provided that the land conveyed should be used for the purposes of a free, public, navigable channel, and that the title conveyed should revert to the grantor if the land "shall at any time * * * be used for any purposes other than specified" (R. 568). It held that the necessity to give effect to these parts of the deeds compelled the conclusion "that the mutual intention of the parties at the time the deeds were executed was that appellee should use the land for the purposes of a free, public, navigable channel and should not use it or have the right to use it for any other purpose" (R. 568).

In so holding, we submit, the court below disregarded the fact that under the law of California language of the character relied upon is not necessarily given the effect thus attributed to it. Rather, the California courts have assimilated the situation to that contemplated by the general rule referred to above, and hold that notwithstanding such language a reverter will not be caused unless the additional uses to which the land is put are inconsistent with the specified purpose for which the land was originally conveyed.

The decisive case on this question is *City of Long Beach* v. *Marshall,* 11 Cal. (2d) 609 (1938), relied upon by the district court (R. 478) but not even mentioned in the opinion of the circuit court of appeals. In that case the state had in 1911 granted to the City of Long Beach certain

tidelands "in trust for the uses and purposes, and upon the express conditions", that "said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor". The case involved the right of the city to drill for oil on the tide lands covered by this grant. Over objection by the state, the court held not only that the city had acquired a fee title subject to conditions, but also that the condition respecting the exclusive use of the lands did not deprive the city of the "right to drill for and extract the oil from these lands which it owns", provided that the operation was not conducted in such manner as to impede the use of the harbor.

The respondent attempts to distinguish this case on the ground that in 1937 the city charter had been amended to permit drilling for oil. But this amendent was plainly irrelevant to the construction of the original grant, which had been made sixteen years earlier.[4] The amendment did not purport to enlarge the estate originally granted, but was simply a general authorization of the production of oil from "any and all lands, including all tidelands, submerged and overflowed lands, whether filled or unfilled, and whether such lands belong to the City of Long Beach, or whether such lands be those in, or from which the City may now or hereafter have the right so to drill for * * * oil". Cal. Stat. 1937, p. 2939. Nor was it relied

[4] Cal. Civil Code (1937), Sec. 1635, provides: "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."

upon by the court for its conclusion; its relevance to the case was only to dissipate any question as to whether, regardless of the scope of the original grant, the city was as a matter of municipal power authorized to engage in drilling operations.[5] The decision has more recently been described as holding that "the municipality had acquired a fee simple title, had become the owner of the minerals therein, and that there was nothing in the grant which purported to deny to it the right to extract them." *Reclamation Dist. No. 1500* v. *Raub,* 58 Cal. App. (2d) 491, 495 (1943).

The respondent in its brief in the court below laid much stress on the case of *Marshall* v. *Standard Oil Co.,* 17 Cal. App. (2d) 19 (1936), as authority for its contention that under California law land granted on the condition of its use exclusively for a specified purpose cannot be used for additional purposes not inconsistent with the use specified. The case, however, supports rather than weakens our position, for the court took pains to point out that the particularly secondary use there proposed—"the erection of oil derricks and the sinking of oil wells upon a public street"—would constitute a public nuisance. Such a use would clearly have been inconsistent with the purpose of the original grant, which was that the

[5] The court said: "Hence, the ownership of the lands being once established in the city, its authority to do the acts contemplated is placed beyond question by this express charter provision."

land was "to be used exclusively for street purposes." Had the court not regarded the case as turning on the extent of the interference with the primary use, its discussion of the effects of oil drilling on a public street would have been completely unnecessary.[6]

In disregarding what we believe to be the rule of the California cases, the court below assumed itself to be bound by one particular phrase contained in the deeds, the phrase "used for any purposes other than specified herein," which the court (footnote 3) said meant "obviously, any purposes other than the purposes of a free, public, navigable channel." We submit that the cases which we have cited recognize, and that the court below erroneously disregarded, the fact that the words "other than" do not in such a context mean "to the exclusion of other uses" but mean rather "for a purpose different from that specified." Such an interpretation is supported by the *ejusdem*

[6] The doctrine thus followed in the California cases is not unique to California. The same view was adopted by the Supreme Court of Michigan in *Central Land Co.* v. *City of Grand Rapids*, 302 Mich. 105 (1942). That case presented a situation almost identical with the case now before the Court; oil production was held not to cause a reverter under a deed which granted the land "upon the express condition that [it] shall be used solely for park, highway, street, or boulevard purposes; and if any part thereof be not used for any of such purposes, or at any time cease to be used for such purpose, or at any time be used for any other purpose," it should revert to the grantor.

generis rule, which is applicable in California as a rule of construction.[7] Applying that rule to the deeds here involved, the reverter provision as a whole clearly relates to discontinuance or abandonment of the channel. Its first two clauses refer specifically to those eventualities. The general language of the third clause refers to the same general subject—the continuance of the use of the land for a channel—and embraces any other manner, not already specified, in which the land might cease to be so used. There is no warrant in the language of the deeds, or in the applicable California decisions, for construing the general words of the third clause of the reverter provision as prohibiting uses which are not inconsistent with and will not interfere with the channel use for which the land was granted.[8]

2. As shown by the oral opinion of the district court (R. 467–506), the principal issue between the parties in that court was whether, under applicable California decisions, the language of the deeds served to convey a fee title, or merely an

[7] Cal. Civil Code (1937), Sec. 1648, provides: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

[8] The single word in either deed tending to indicate an exclusion of secondary uses even though not inconsistent with channel use is the word "only" in the phrase "for the construction, maintenance and use of a free, public, navigable channel or waterway only" in the first deed. It is not clear

easement. The district judge, himself an expert in California law relating to oil lands,[9] confined his analysis of the California authorities to authorities bearing upon this question. In the absence of provisions specifically reserving to the grantor the right to drill for oil—and there is, of course, no such reservation here—the California law is, we believe, clear that the right to drill for oil follows the fee title to the land, and may be exercised by the grantee so long as the exercise of the right does not interfere with any particular use upon which the grant of the land is conditioned. This, we submit, is the necessary result of *City of Long Beach* v. *Marshall,* 11 Cal. (2d) 609 (1938), *supra,* pp. 10–12, in which the major portion of the opinion was devoted to the question whether the grant conveyed a fee. "The ownership of the lands being once established in the city," and no reservation of mineral rights appearing in the grant itself, it followed, in the court's judgment, that the city was entitled to drill for oil.

---

that the court relied to any extent on this use of the word "only"; but in any event no such reliance would be justified, since the phrase in which it was contained was entirely omitted from the second deed, plainly indicating that the grantor did not regard the phrase as important, or as affecting the title conveyed.

[9] Cf. R. 412, 413, 415, 443. Prior to his appointment to the Federal bench Judge Yankwich served for eight years as judge of the Superior Court of Los Angeles County.

The court below declined to pass upon the question whether the deeds here involved conveyed a fee title or merely an easement, holding that in either event the language of the deeds would cause a reverter of the lands if they were used for oil drilling. In the light of the *Long Beach* case we submit that the action of the court below was in this respect also probably in conflict with applicable decisions of the California courts.

3. Under Point 1 above we have sought to show that in the light of applicable decisions of the California courts the deeds here involved are properly to be construed as permitting the United States to extract the underlying oil without causing a reverter of the granted lands. We believe that the deeds on their face show this to have been the intention of the parties, and that the court below was in error in holding otherwise. Even were the deeds not thus clear, we submit that our argument under Point 1 is sufficient to show that they are at the very least susceptible of a construction other than that adopted by the circuit court of appeals, and that their language leaves doubt that the parties intended any such result as reached in the decision below. This doubt is increased by reference to portions of the deeds not mentioned by the court in its opinion.[10] In such a situation the refusal of the

[10] E. g., the court made no mention of the provision requiring consent by the United States to any use by the grantor of any unused portion of the lands conveyed (see p. 21,

court below to go beyond the four corners of the deeds was in itself inconsistent with California law, which calls for a careful examination of the background facts if the intent of the parties is not clear from the terms of the documents under construction.[11]

Resort to the circumstances surrounding the execution of the deeds would have disclosed the complete absence of any basis for concluding that the parties intended to reserve to the grantor mineral rights in the lands conveyed, or to preclude the United States from enjoyment of such minerals as might be found to exist. The railroad, desiring a better channel to serve its adjoining lands, was the moving party. The Secretary

---

infra), nor of the recitals of the first deed indicating an intention to convey fee title to "a strip of land," without restriction or limitation so long as it was used for channel purposes.

[11] Cal. Civil Code (1937), Sec. 1647, provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Under Sec. 1637 of the Code this section is applicable whenever the intention of the parties is "otherwise doubtful." Cf. Cal. Code of Civil Procedure (1937), Sec. 1860, which provides as a rule of evidence that: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." These rules are invoked "where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said." *United Iron Wks.* v. *Outer H. etc. Co.*, 168 Cal. 81, 84 (1914).

of War granted its application on condition that the strip to be used for the improved channel should "be deeded to the United States, free of cost" (R. 164). Nowhere was mention made of any mineral reservation or limitation upon the grant. The railroad accepted the condition imposed by the Secretary of War, and executed the 1908 deed in performance of it. The deed itself recited at length the facts concerning the permit, and that the grant was made in performance of the condition (R. 183–184). The resolution of the railroad's board of directors authorizing execution of the deed failed to refer to any reservation of minerals (R. 191–196.)[12] The trustee of a mortgage on the railroad's property executed a quitclaim deed direct to the United States (R. 198–200), and neither the quitclaim deed nor the resolution of the trustee's executive committee (R. 201–202) made any mention of mineral reservation or of limitations on the grant.

The 1918 deed was the result of a tri-party agreement between the railroad, the City of Long

[12] As originally authorized and executed, the deed did not describe the property by metes and bounds, and permitted the continued use of the property by the grantor until required for channel purposes (R. 195). This provision had been sought by the company to enable it to keep squatters off the land (R. 266–267). At the insistence of the Department of Justice a new deed was executed containing a revised description of the land, and requiring vacation of the land by the grantor upon sixty days notice (R. 268–270).

Beach and the United States. It was contemplated that this deed would have the same effect as the 1908 deed (R. 213). Apart from the recitals, which could not appropriately be the same in the second deed as in the first, the second deed was substantially identical in form with the first. The only significant change was that, whereas the earlier deed had granted the strip of land to the United States "for the construction, maintenance and use of a free public navigable channel or waterway only" (R. 184), the quoted phrase was entirely omitted from the granting clause of the 1918 deed R. 241).[13] Again, in the correspondence and documents surrounding this transaction no reference was made to mineral reservations or to limitation of the use to which the land might be put. The trustee of a mortgage upon the railroad, at the request of the railroad, executed a quitclaim deed to the United States which contained no limitations (R. 245–249).[14] And the trustee's board of directors, in authorizing the quitclaim deed, merely referred to a conveyance "for ship channel purposes" (R. 250).

We submit that a careful reading of all the documents surrounding the execution of these

[13] The 1918 deed exactly followed the California statutory form for the conveyance of real property, Cal. Civil Code (1937), Sec. 1092.

[14] It was this deed which actually conveyed the legal title which was held by the mortgage trustee (R. 254).

deeds makes clear that the parties intended an outright transfer of the fee to the United States, subject only to reversion to the grantor when, if ever, the channel should be abandoned, and the purposes of the arrangement thereby exhausted. The district court so held, after review of all the pertinent documents. It said (R. 504):

> * * * that the intention was not to secure to the Government an easement, but the conveyance of the fee, and that the references to the uses to which it was being put are, at best, merely a condition subsequent, for the violation of which the Government might be subject to injunctive process, or other remedies, or even more drastic penalty, should the Government devote any part of the channel to the purposes which are entirely foreign or inconsistent with the use of the channel for navigation.

And with particular reference to the subject matter of this litigation, it said (R. 505):

> While no right of reversion or forfeiture is reserved to or in defendants in respect to said parcels described herein; there is a reservation or condition subsequent, and that is the use for channel purposes, the production of oil and gas from the properties conveyed to the plaintiff, without discontinuing or abandoning the use thereof as a free, public, navigable waterway in such manner as not to interfere with or impede such use, will not invest defendants with any right to invoke such condition and accomplish such reversion to it.

Not only is this the fair intendment of the deeds, read in the light of the circumstances which led to their execution; it is the only construction consistent with other general principles of law, applicable in California as elsewhere. As the court below pointed out (R. 568), under California law the whole of a contract "is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (Cal. Civil Code (1937), Sec. 1641); yet the court totally disregarded the provision of the deeds requiring approval by the United States of any "use and occupation by the grantor * * * of the unused portion" of the lands conveyed, and providing further that such use and occupation should "in no manner affect the rights" granted by the deeds. This provision would be meaningless and absurd [15] if the United States had no right to use the lands except for channel purposes. Furthermore, the decision of the court below leaves open the possibility that the United States, notwithstanding the restriction on its right to use the land, might be held to have acquired a fee title, including title to the underlying minerals. This is what the district court held (R. 505, 119), and we believe that under California law the deeds allow no other construction. The decision there-

[15] Section 1638 of the Civil Code provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and *does not involve an absurdity.*" [Italics supplied.]

fore sanctions the existence of a situation in which the owner of the fee may not extract his own minerals, nor make any other use of his land save for a designated purpose even though such other use would not interfere with such purpose. Such a holding would mean that the parties were assumed to have intended to freeze the minerals in place, even though no benefit could accrue to the railroad from such restriction until some remote and indeterminate time in the future. The policy of the law, as expressed in the rule against perpetuities, views such restrictions with disfavor. See Cal. Civil Code (1937), Secs. 715–718; *Estate of Fair,* 132 Cal. 523 (1901). And the policy of the law equally frowns upon conditions involving forfeiture, and demands an interpretation which if possible will avoid that result. Cal. Civil Code (1937), Sec. 1442.

The conditions in the deeds were not sought by the United States, but were insisted upon by the respondent (R. 269), and the reverter provision was in language proposed by the respondent (R. 194–195). The respondent, therefore, is "the party who caused the uncertainty to exist," against whom the language of the deeds should under Section 1654 of the Civil Code "be interpreted most strongly." Moreover, at the time of the execution of the 1908 deed there had recently been decided the case of *Los Angeles University* v. *Swarth,* 107 Fed. 798 (C. C. A. 9, 1901), dealing with the right of a grantor to restrain Los

Angeles University from extracting oil from land which had been conveyed subject to the "express condition" that it should be "used exclusively as a part of the campus of said university". Notwithstanding the reference to "express condition," the court had treated the restriction as a covenant, saying: "Conditions are not favored in law, and are construed strictly, because they tend to destroy estates" (p. 803); and the court had further held that such a covenant, as distinguished from a condition, was not enforceable by the grantor. That decision, construing a California deed, cannot well have escaped the attention of skilled railroad counsel, who must have known that deeds are to be construed "according to the laws in force at the time they were executed" (*Burnett* v. *Piercy,* 149 Cal. 178, 189 (1906)), and who must have likewise known that deeds to the Federal Government would be interpreted by the Federal courts. If a prohibition of secondary uses or a reservation of minerals had been intended, they would have been particularly careful in view of the *Swarth* decision to express such intention in unmistakable language. Cf. *Las Posas Water Co.* v. *Ventura County,* 97 Cal. App. 296 (1929); *Cooper* v. *Selig,* 48 Cal. App. 228 (1920).

4. As noted in Point 2 above (pp. 15–16), we believe that the court below disregarded California law in declining to decide whether the deeds conveyed fee title or merely granted an easement. De-

termination of this question is of great importance to the Government for practical purposes even though the decision of the court below should stand. For assuming that the Government may not recover the oil because to do so would cause a reverter, the respondent also is precluded from so doing if the deeds convey a fee to the Government. Doubtless contractual arrangements for recovery of the oil could be effected, but negotiations can obviously not be satisfactorily conducted without a judicial determination as to whether the Government or the respondent owns the minerals. In view of the large amount of oil involved, and the urgent present-day need to utilize all available sources of supply, it is important that "the rights, duties and obligations of the parties hereto arising from such conveyances" be adjudicated, as asked in the complaint (R. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below has decided an important question of California law in a manner inconsistent with applicable decisions of the California courts, and that the decision should therefore be reviewed by this Court on writ of certiorari.

CHARLES FAHY,
Solicitor General.

APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944